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# **The SEA Directive and the Legal Construction and Control of Government Environmental Policy**

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## **1 Introduction**

Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (the ‘SEA Directive’)<sup>1</sup> is a novel kind of legal instrument. In broad terms, it extends the well-established concept of environmental assessment by applying it to certain government plans and programmes, and it reconfigures its requirements, making them more demanding in some respects.<sup>2</sup> However, as European legislative debates around the precise formulation of the Directive reveal, it is politically contentious.<sup>3</sup> This is because the Directive does not merely extend the application of an existing environmental regulatory tool but it makes inroads into the inner workings of national governments in areas that are arguably beyond the competence of the EU institutions. The Directive makes a move that is controversial not only in terms of EU competence,<sup>4</sup> but also for its potential constitutional implications in Member State legal orders. This latter point was made plain in the recent decision of the United Kingdom Supreme Court in *R (HS2 Action*

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<sup>1</sup> Parliament and Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30 (‘SEA Directive’).

<sup>2</sup> Particularly by requiring rigorous assessment of alternative options to a proposed plan or programme: SEA Directive, art 5(1).

<sup>3</sup> See Robert McCracken and Ned Westaway, ‘The History and Context of the SEA Directive’ in the current volume, #.

<sup>4</sup> Thus, for example, it modifies processes for formulating plans for land use, infrastructure policy, water management: SEA Directive, art 3(2) and 3(4).

*Alliance Limited) v The Secretary of State for Transport and anor ('HS2')*,<sup>5</sup> in which the Court was at pains to discern and decide how the application of the Directive did not (and could not) impede parliamentary sovereignty in the United Kingdom.<sup>6</sup> This chapter reflects on this controversial legal picture in UK law in two ways. First, it considers how the Directive is in fact unremarkable in environmental law – Section 2 examines how the Directive is one of many ways in which environmental law constitutes and limits policy relating to environmental matters. However, it does present an interesting example of how this phenomenon occurs, and Section 3 of the chapter considers how the extent of the Directive's constitutive and limiting impact on policy is determined by its judicial interpretation. Second, the chapter reflects on the public law significance of the Directive, examining the extent to which it challenges or informs public law concepts and debates. More than the Directive's controversial potential to control Parliamentary decision-making, Section 4 argues that a particularly notable public law dimension of the Directive concerns its limiting of governmental and executive power.

## **2 Environmental Law and Policy**

Environmental law, as a subject, provides a legal context in which questions, and arguably answers, about the nature of law are different. It is not a single body of doctrine, supervised primarily by courts and characterized (solely) by bi-polar disputes between individuals or even by criminal prosecutions brought by the state. It is a much messier legal context. This is particularly because environmental law concerns a wide body of regulation and administrative activity that governs

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<sup>5</sup> [2014] UKSC 3 ('HS2').

<sup>6</sup> See e.g. *ibid* at [38]-[39] (Lord Carnwath). Notably the Court was even more exercised over the constitutional issues raised by the prospect of reviewing Parliamentary processes for their compatibility with the EIA Directive. See Denis Edwards, 'HS2 – The First Spike' (2014) 26(2) JEL 319.

environmental problems.<sup>7</sup> Much environmental law is thus concerned with regulatory strategy – some of which is *sui generis* and even ‘non-legal’<sup>8</sup> – and with the constitution of public administration.<sup>9</sup> Within this regulatory domain, *policy* has a pervasive role in informing administrative decision-making and in constituting environmental regimes. As a significant feature of administrative decision-making, policy is also controlled by law, so that it is itself legally constituted in significant ways. The SEA Directive is a prominent example of generating this latter effect.

### **What is Environmental Policy?**

In general, environmental policy is not a monolithic concept. At its broadest, ‘environmental policy’ refers to a course of action adopted to secure, or that tends to secure, a state of affairs in relation to environmental matters that is conceived to be desirable.<sup>10</sup> However, this jurisprudential definition does not begin to suggest the full array of policy at work or otherwise implicated in environmental law.<sup>11</sup> ‘Policy’ in environmental law comes in all shapes and sizes – including Ministerial statements and central government policy papers that set the overarching direction of environmental and planning regulation, to local development plans required under planning statutes, to regulator-generated guidance for industry concerning their compliance with environmental regulation, to technical reference documents on best industrial practice generated at the EU level, to statutory guidance required by particular regimes (such as land contamination) to fill in the detail of their operation. All these different forms of ‘policy’ need to be viewed in their own terms in order to

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<sup>7</sup> Thus most environmental law claims that go to court in the UK are public law disputes that challenge administrative discretion and decision-making.

<sup>8</sup> Elizabeth Fisher et al, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21(2) JEL 213, 225.

<sup>9</sup> Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007).

<sup>10</sup> Adapting the definition in Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford 1994) 261.

<sup>11</sup> *Bushell v Secretary of State for the Environment* [1981] AC 75, 98.

identify and appraise their legal roles and effects.

### **The Legal Effects and Constraint of Environmental Policy**

As indicated above, there are two broad ways in which different kinds of policy are relevant or implicated in environmental law. First, some policy has legal effects.<sup>12</sup> These legal effects might be prescribed by the statutory framework that empowers the formulation of a relevant policy;<sup>13</sup> they might arise as a matter of administrative law doctrine;<sup>14</sup> and they might arise simply because, in practice, policy instruments contain important regulatory and technical details that dictate how an environmental regime in fact works. Thus policy instruments can act as a primary source of legal obligations for those who are subject to a relevant regime,<sup>15</sup> and they can also control acts of administrative decision-making to which they relate as a matter of public law. In the latter sense, Government is regularly held to account for failing to comply with its own policy.<sup>16</sup> Similarly, policy documents are fundamental to the legal operation of the English planning regime, since a range of policies (including the National Planning Policy Framework, National Infrastructure Statements, Local Development Plans) must be taken into account in planning decisions as they are relevant.<sup>17</sup> Even evolving planning policy can be found to have legal effects on decision-making in the planning regime.<sup>18</sup> And whilst policies are not treated as legally binding as statutes,<sup>19</sup>

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<sup>12</sup> See further Elizabeth Fisher, Bettina Lange, Eloise Scotford, *Environmental Law: Text, Cases and Materials* (OUP 2013) ch 11.

<sup>13</sup> e.g. Waste (England and Wales) Regulations 2011 SI 2011/988, reg 15(2).

<sup>14</sup> *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13.

<sup>15</sup> e.g. BAT Reference documents under the EU integrated pollution prevention and control regime (see <<http://eippcb.jrc.ec.europa.eu/reference/>>, accessed 1 August 2014; Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17, art 14(3)).

<sup>16</sup> e.g. *R (Manchester Ship Canal) v Environment Agency* [2012] EWHC 1643 (QB).

<sup>17</sup> Town and Country Planning Act 1990, s70(2); Planning and Compulsory Purchase Act 2004 (PCPA), s 38(6).

<sup>18</sup> *Cala Homes (South) Limited v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639.

<sup>19</sup> *Tesco Stores* (n 14) [19]. See also *R v Derbyshire County Council; ex p Woods* [1998] Env LR 277, 288-9, 290-2 (recognising that policies are different from statutes when it comes to their legal interpretation).

much depends on the nature of the policy in determining its legal effects – including who issued the policy document,<sup>20</sup> how well considered was its formulation,<sup>21</sup> and whether the policy leaves room for judgment.<sup>22</sup> Overall, environmental policy instruments have a range of legal effects, the precise nature of which can involve a close exercise in legal analysis that takes into account the statutory and decision-making context, as well as the nature of the relevant policy itself.

Second, rather than having legal effects (or as well as having such effects), some policy is constituted or constrained by law. Thus when policy is created under a statutory regime, it will be legally constructed by the terms of the legislation that empowers its creation.<sup>23</sup> Such policy will be susceptible to challenge by way of judicial review if it does not conform to the relevantly applicable statutory framework, on grounds of illegality or the failure to take into account relevant considerations.<sup>24</sup> Beyond this, the legal constraints on the *high-level strategic policy* of the government on environmental issues are of particular note. On the one hand, it is a basic constitutional principle, central to administrative law, that evaluating the merits of high-level policy is beyond the proper scope of judicial review, and that its review on grounds of legality should be very limited.<sup>25</sup> However, in the environmental sphere, high-level policy is subject to legal constraints in at least three

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<sup>20</sup> *ibid.*

<sup>21</sup> *Manchester Ship Canal* (n 16) [93] and generally.

<sup>22</sup> *Tesco Stores* (n 14) [18]. See further Eloise Scotford and Jonathan Robinson, ‘UK Environmental Legislation and its Administration in 2013 – Achievements, Challenges and Prospects’ (2013) 25(3) JEL 383, 397-399.

<sup>23</sup> E.g. Environmental Protection Act 1990, s78YA – in relation to contaminated land regime statutory guidance – not only indicates what should be included in the guidance in terms of content (detailed provisions on defining and identifying contaminated land, and identifying the appropriate persons responsible for remediation), but also the procedure for formulating the guidance, including consultation requirements and parliamentary approval. Aspects of policy may also be constructed by other, related pieces of legislation: e.g. Conservation of Habitats and Species Regulations 2010, SI 2010/490, regs 39, 102, 103, 106.

<sup>24</sup> Such a challenge might also be made in relation to policy otherwise shaped by a statutory regime: *Dimmock v Secretary of State for Education* [2007] EWHC 2288 (Admin).

<sup>25</sup> *R v Secretary of State for the Environment; ex p Hammersmith and Fulham LBC* [1991] UKHL 3, 12.

ways.

First, in some cases, courts have undertaken intensive judicial review in relation to high-level government policy. By applying judicial review principles broadly and purposively in some cases, courts have extended ‘legality’ review to cover the substance of policy decisions made by Government, where these have an environmental dimension.<sup>26</sup> Second, administrative law doctrine may require that environmental policy is to be developed in a certain way. Thus, full public consultation will be legally required when the Government has promised this.<sup>27</sup> Third, some high-level policy is also subject to statutory requirements and constraint, particularly when made under highly prescriptive legislation such as the *Climate Change Act 2008*,<sup>28</sup> or under provisions implementing EU environmental legislation. In this third sense, there is a range of EU law constraints on high-level UK government policy relating to the environment, which both require and shape the substance of particular strategic environmental policies,<sup>29</sup> and which require environmental assessments in relation to some policies when they are likely to have significant environmental effects, as in the case of the SEA Directive. It is this latter kind of constitutive impact or ‘constraint’ with which this chapter is directly

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<sup>26</sup> *R v Secretary of State for Foreign Affairs; ex p The World Development Movement* [1995] 1 All ER 611. See A H Hammond, ‘Judicial Review: the Continuing Interplay between Law and Policy’ (1998) PL 34.

<sup>27</sup> *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311. It might also be argued that the public should be fully consulted in relation to the formulation of any strategic UK environmental policy since Article 7 of the Aarhus Convention, to which the UK is a signatory, requires this: *ibid* [49]; cf *HS2* [52] (Lord Carnwath concluding that the Aarhus Convention was not directly helpful in interpreting the public participation requirements of the SEA Directive).

<sup>28</sup> See *Climate Change Act 2008*, ss 4-10 in relation to government Carbon Budgets.

<sup>29</sup> E.g. river basin management plans required under Council and Parliament Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L327/1, art 13; action programmes required under Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1, art 5; and waste management and prevention programmes required under Council and Parliament Directive 2008/98/EC on waste and repealing certain Directives [2008] OJ L312/3 (Waste Framework Directive), arts 28 & 29. Also note the binding effect of the waste hierarchy in the Waste Framework Directive (art 4) on UK waste policy.

concerned, but as seen here, it is part of a larger legal picture relating to environmental policy. In combination, these various constraints render a significant body of government policy subject to legal obligation and scrutiny, although the precise impact of any legal oversight should not be presumed. If any of the legal requirements outlined above are enforced in court, much will depend on the intensity of any judicial review undertaken in determining whether government decision-makers have met these legal obligations in creating or applying a particular environmental policy.

In sum, UK environmental law relies on policy to do all sorts of things that a UK lawyer, particularly a constitutional lawyer or theorist might initially balk at.<sup>30</sup> In particular, by acting as an effective source of legal obligation in some cases and coming under review by the courts even when made at a high strategic level, environmental policy challenges the influential Dworkinian view that policy and law are properly separate concepts.<sup>31</sup> This is not a legal domain where matters of policy – even understood in the more limited, elevated sense of ‘high-level strategic policy’ – are left purely to the discretion of government or Parliament. However, this state of affairs is not a simple legal picture or a descriptive *fait accompli*. As indicated, the precise legal effects of, and limits to, environmental policy are variable – they depend on the particular type of environmental policy and the particular legal control mechanism or issue at stake. Furthermore, there are important public law questions to be asked about whether this legal picture presents an acceptable state of affairs. The following sections consider these two issues in the context of the SEA Directive: examining the actual legal limits imposed by the Directive in relation to the

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<sup>30</sup> Environmental law is not necessarily special in this respect. See e.g. the complex role of policy in immigration law: e.g. *R (Pankina) v SSHD* [2010] 3 WLR 1526.

<sup>31</sup> Ronald Dworkin, *Taking Rights Seriously* (2nd ed, Duckworth 1978) 22-28, 84-85.



environmental policy of government, and considering their public law implications.

### **3 The Mechanism of the SEA Directive in Constituting and Limiting Environmental Policy**

In determining the legal impact of the SEA Directive in relation to environmental policy, the first thing to note is that the Directive is not a wholesale programme for subjecting all ‘strategic’ environmental policy to environmental assessment.<sup>32</sup> It is a more limited and precise legal mechanism. In particular, it requires environmental assessment (meeting the requirements of Articles 4 and 5 of the Directive) to be undertaken for public<sup>33</sup> ‘plans or programmes’ that:

- are *required* by legislative, regulatory or administrative provisions;<sup>34</sup>
- are *likely to have significant environmental effects*;<sup>35</sup> and
- *set the framework* for future development consent of projects.<sup>36</sup>

In particular, the Directive requires an assessment of all plans and programmes that relate to agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning and land use, and where such plans ‘set the framework’ for approving projects listed in Annexes I or II of the Environmental Assessment Directive.<sup>37</sup> An

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<sup>32</sup> As Lord Carnwath and Lady Hale point out in *HS2*, the word ‘strategic’ does not actually appear in the text of the Directive, although commonly used to describe it in shorthand: *HS2* (n 5) [35], [131].

<sup>33</sup> i.e. plans and programmes ‘which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government’: SEA Directive, art 2(a).

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*, art 3(1).

<sup>36</sup> *ibid.*, art 3(2) and (4).

<sup>37</sup> *ibid.*, art 3(2)(a), subject to the exception in art 3(3), i.e. cases where a plan or programme determines the use of small areas at local level or involves minor modifications to the plans and programmes included in art 3(2), unless a Member State determines they are likely to have significant environmental effects.

assessment under the Directive is also required for plans or programmes determined to require an assessment under Article 6 or 7 of Directive 92/43/EEC (the Habitats Directive),<sup>38</sup> whether or not they ‘set the framework’ for future consent decisions.<sup>39</sup> Otherwise, Member States need to determine whether a relevant plan or programme that sets the framework for future development consent decisions is likely to have significant environmental effects, on a case-by-case basis and/or by specifying certain types of plans and programmes.<sup>40</sup> Notably two categories of government policy are excluded from the scope of the Directive – plans or programmes solely aimed to serve national defence or civil emergency, and financial or budget plans and programmes.<sup>41</sup> Beyond this, identifying what kinds of government policy are in fact caught by the Directive involves a delicate exercise in interpretation of the Directive.<sup>42</sup> This section undertakes this interpretive exercise in order to get an accurate picture of what governmental policy falls within the scope of the Directive, before considering the overall effect of the Directive in constituting and constraining such government policy.

### **What Kinds of Government Policy Fall within the Directive?**

In determining the extent to which government policy is subject to the Directive, there are two main points of statutory interpretation to consider. First, when is a plan or programme ‘required by legislative, regulatory or administrative provisions’? The more broadly this phrase is defined, the more government policy will be covered. To date, the interpretation of this phrase by courts has been highly ambiguous and not

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<sup>38</sup> Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

<sup>39</sup> *ibid*, art 3(2)(b), subject to the same art 3(3) exception.

<sup>40</sup> *ibid*, art 3(4).

<sup>41</sup> *ibid*, art 3(8).

<sup>42</sup> This is not an easy exercise, as several of the chapters in this volume highlight. See in particular the chapters by Stephen Ashworth, David Elvin, Valerie Fogelman, and Simon Ricketts & Juliet Munn.

finally resolved, at least in UK courts. Second, similar challenges of interpretation arise in determining what kinds of plans and programmes ‘set the framework’ for future consent decisions, which again affect the scope of the Directive. This requirement is not just ambiguous but it raises difficult questions about the timing of the Directive’s application. Furthermore, and at least in UK law, the identity of the future consent decision-maker – in particular, whether they are a Member of Parliament or part of the executive – has a significant impact on whether a relevant ‘plan or programme’ will be subject to the Directive’s assessment obligations.

*‘Required by legislative, regulatory or administrative provisions’*

Advocate-General Kokott in *Terre Wallonne* indicated that the requirement in Article 2(a) that a plan or programme be ‘required by legislative, regulatory or administrative provisions’ meant that ‘freely taken political decisions on legislative proposals are not therefore subject to the obligation to carry out assessments’.<sup>43</sup> If this were the case, then policies that were adopted on the sole initiative of the legislature (or one assumes on the initiative of the executive whether or not in legislative form) would be immune from the requirements of the Directive. Even in this scenario, many plans and programmes would be caught by the Directive, at least in the English and UK context, since many policy documents are required by legislative provisions. Thus, for example, Part IIA of the Environmental Protection Act 1990, establishing the contaminated land regime, operates on the basis that statutory guidance is issued in accordance with the requirements of section 78YA. More comprehensively, the Planning and Compulsory Purchase Act 2004 requires a suite of planning policy documents to be drawn up by local planning authorities as

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<sup>43</sup> Case C-567/10 *Inter-Environnement Bruxelles ASBL v Gouvernement de la Région de Bruxelles-Capitale*, Opinion of AG Kokott (17 November 2011) para 41.

their ‘local development scheme’.<sup>44</sup> Another example, in which legislation requires the development of more cross-cutting policy that is likely to have significant environmental effects, is the obligation on the government to set carbon budgets under the Climate Change Act 2008.<sup>45</sup> This latter example shows how the ‘required by’ limit of the SEA Directive does not exempt highly political and strategic government policy from the scope of the Directive, even on a strict interpretation of the term, considering the extensive statutory construction of policy in the UK.

However, beyond these straightforward cases, there are other kinds of government policy that are likely to have significant effects on the environment, but which are not strictly ‘required by’ legislative measures. It is debatable whether these come within the scope of the Directive. For instance, what of policy documents likely to have significant effects on the environment, which are empowered, rather than required, by legislation (such as Ministerial guidance on the application of the waste hierarchy and waste collection requirements under the Waste (England and Wales) Regulations 2011)?<sup>46</sup> Or similar policy documents that are regulated but not required by legislation (such as National Policy Statements for ‘specified descriptions of development’ that may be designated by a Minister under the Planning Act 2008)?<sup>47</sup> Or that are required by other policy documents (such as ‘Travel Plans’ under the National Planning Policy Framework)?<sup>48</sup> On one view, all these kinds of policy instruments fall without the SEA Directive since they are not strictly ‘required’ by legislative, regulatory or administrative provisions.<sup>49</sup> However, the picture is not that

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<sup>44</sup> PCPA, s 15. See also Regulatory Enforcement and Sanctions Act 2008, ss 63-65.

<sup>45</sup> Climate Change Act 2008, s 4(1)(a).

<sup>46</sup> SI 2011/988, reg 15(2).

<sup>47</sup> Planning Act 2008, s 5.

<sup>48</sup> Department of Communities and Local Government, *National Planning Policy Framework* (2012) [36].

<sup>49</sup> This is the view of Lords Mance and Neuberger in *HS2*.

clear-cut, in light of Court of Justice of the European Union (CJEU) case law. Recognising that other such policy documents might still have significant effects on the environment, the CJEU in *Inter-Environnement Bruxelles* rejected ‘a mere literal interpretation of [the] provision’ in Article 2(a). In line with the Directive’s objective to provide for a high level of environmental protection, the Court held that:<sup>50</sup>

plans and programmes whose adoption is *regulated* by national legislative or regulatory provisions [or presumably administrative provisions], *which determine the competent authorities for adopting them and the procedure for preparing them*, must be regarded as ‘required’ within the meaning [of Article 2(a)].

This expansive approach to the meaning of ‘required’ reflects the purposive interpretation of many environmental provisions by the CJEU,<sup>51</sup> and it considerably widens the scope for government policy potentially to fall within the scope of the SEA Directive. In *HS2*, Lady Hale indicated the possible breadth of the CJEU’s formulation above, in that ‘administrative provisions’ regulating the procedure for preparing plans or programmes could include the Government’s Consultation Principles,<sup>52</sup> which apply to all forms of Whitehall policymaking. This leaves out of account the CJEU’s requirement that the provisions should also ‘determine the competent authorities for adopting’ relevant plans and programmes, but such a provision would certainly cover forms of government policy which government actors are *empowered* by statute or policy to make (such as the waste guidance or National Policy Statements above). All that would seem to fall outside this definition is UK government policy that is generated on the initiative of government, in relation to

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<sup>50</sup> Case C-567/10 *Inter-Environnement Bruxelles* (CJEU, 22 March 2012) para 31 (emphasis added).

<sup>51</sup> e.g. Joined Cases C-418/97 & C-419/97 *Arco Chemie Nederland Ltd v Minister Van Volkshuisvesting* [2000] ECR I-4475; Case C-371/98 *R v Secretary of State for the Environment, Transport and the Regions, ex p First Corporate Shipping Ltd* [2001] Env LR 34; Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405.

<sup>52</sup> UK Cabinet Office, ‘Consultation Principles: Guidance’ (2013), formerly the Government’s ‘Code of Practice on Consultation’ (2008).

which there are no administrative, regulatory or legislative provisions indicating who should adopt the relevant policy (albeit that there do exist administrative provisions relating to the process of its formulation). However, as Lord Carnwath pointed out in *HS2*, we have no definitive understanding of ‘administrative provisions’,<sup>53</sup> which at its widest could mean all principles of public law, including constitutional conventions concerning the power of government to introduce policy and propose legislation. Such a broad understanding would bring *all* government policy within the scope of the Directive, at least to the extent it is ‘regulated’ by ‘legislative, regulatory or administrative provisions’.

Rather than tackling this interpretive issue directly, the Supreme Court in *HS2* avoided deciding it, in light of their finding that the government policy document at issue in that case did not relevantly ‘set the framework’ for future consent of projects. However, the *HS2* litigation did provide diametrically opposed views on the issue. The majority in the Court of Appeal suggested that if a plan or programme ‘set the framework’ for future consent decisions, it was difficult to say that it was not ‘required by administrative provisions’.<sup>54</sup> It is challenging to see the logic in this position, but it has the potential to strip the requirement in Article 2(a) of all meaning, which is quite the opposite of what it was intended to do (as highlighted by AG Kokott’s point above).<sup>55</sup> At the other end of the spectrum, Lords Neuberger and Mance were strongly of the view that the CJEU had clearly got this issue wrong in *Inter-Environnement Bruxelles*: ‘in the interests of a more complete regulation of

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<sup>53</sup> *HS2* [21].

<sup>54</sup> *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2013] EWCA Civ 920 [71].

<sup>55</sup> Lords Neuberger and Mance point out the ‘striking’ legislative history of the SEA Directive that led to this wording, including the rejection of a Commission proposal that had no provision for plans and programmes to be ‘required by’ law, and also a revised proposal which qualified that such plans or programmes must be ‘*provided* for in legislation or based on regulatory or administrative provisions’: *HS2* [178].

environmental developments, [the Court has given the legislative provision] a meaning which the European legislature clearly did not intend.<sup>56</sup> Their Lordships would like to see a fresh reference to the CJEU on the matter.<sup>57</sup> Whichever way future interpretation of this provision goes, it will have an impact on the scope of government policy included in the Directive and on the extent to which executive policy making processes are subject to the requirements of the Directive.

### *Setting the Framework for Future Development Consent*

Like the provision that a plan or programme must be ‘required by legislative, regulatory or administrative provisions’, the requirement that a plan or programme ‘set the framework’ for future development consent of projects<sup>58</sup> has proved an interpretive challenge. Competing judicial interpretations of ‘setting the framework’ have included ‘being determinative’ of future development consents, ‘setting criteria’ for their determination, or being more loosely ‘influential’ in the determination of such consents. In this way, the Court of Appeal in *HS2* saw there being a ‘spectrum’ of ‘influence’ of relevant plans and programmes, which could be caught by the Directive, including potent factual influence as well as legal influence.<sup>59</sup> In the Supreme Court, Lord Carnwath saw the matter more narrowly, finding that a plan or programme should set ‘limits on the scope of things that can be considered’ in a future development consent decision in order to ‘set the framework’ for such a

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<sup>56</sup> *ibid* [189].

<sup>57</sup> *ibid*.

<sup>58</sup> This is a requirement for all applications of the SEA Directive except where an assessment is required under the Habitats Directive, as set out above: see nn 37-40 and accompanying text.

<sup>59</sup> *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2013] EWCA Civ 920 [54]. Note Lord Carnwath’s approval of counsel’s argument that the CA’s ‘influencing’ test should be qualified so that the influence ‘must be such as to *constrain* subsequent consideration, and to prevent appropriate account from being taken of *all the environmental effects* which might otherwise be relevant’: *HS2* [40]

decision.<sup>60</sup> He saw this interpretation of EU law as being ‘acte clair’, driven by the core purpose of the Directive:<sup>61</sup>

One is looking for something which does not simply define the project, or describe its merits, but which *sets the criteria* by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not *constrained* by earlier plans which have not themselves been assessed for likely significant environmental effects.

However, even on this narrower view, with which all members of the Supreme Court essentially agreed, this includes a wide range of strategic government policy. This is because, in English administrative law terms, ‘setting the criteria’ that bind future decision-makers translates legally into setting material considerations that a future decision-maker must take into account where relevant (or not take into account where irrelevant). Considering the extent to which policy documents have legal effects in administrative law terms, as discussed in Section 2 above, this means that a wide range of policy documents could still be seen to ‘set a framework’ for future development consent. As Lord Sumption recognised in *HS2*, there are many different kinds of environmental policy with different kinds of legal effects:<sup>62</sup>

The legal effect of these general policies may be weaker or stronger. In some cases development consent must be given or refused in accordance with the policy subject to limited exceptions, while in others the obligation of the planning authority is only to have regard to or take account of it.

This recognises and confirms two aspects of environmental policy discussed in the previous section: the terms of the SEA Directive recognise that policy documents concerning the environment have legal effects (so that they ‘set the framework’ for future decisions), but these effects can vary depending on the nature of the policy instrument at issue.

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<sup>60</sup> *HS2* [49].

<sup>61</sup> *ibid* [36] (emphasis added).

<sup>62</sup> *HS2* [121].



The wide impact of this interpretation of the ‘setting the framework’ requirement can be seen by example. On Lord Carnwath’s reasoning, at least the following would come within the scope of the Directive in relevantly setting the framework for future development consent decisions: planning policy documents of all types (local development schemes, the NPPF, National Policy Statements, and the like) in relation to planning decisions,<sup>63</sup> waste and water management plans in relation to any related infrastructure planning consent or environmental permit, and potentially any government policy that is considered to be a material consideration in administrative law terms for making a consent decision. It is notable that land-use and town planning policies, in particular, are seen to be the ‘paradigm’ case falling within the Directive’s scope.<sup>64</sup> Even in this case, the impact of the Directive’s application is wide-ranging. This is because planning policies, even if quite formalised in the English planning system, are highly politicised documents that concern issues in relation to which Member States are reluctant to cede competence.<sup>65</sup> The Directive’s oversight of their formulation represents a significant inroad into domestic policymaking and control over land-use by EU measures. This has significant political and legal consequences as it seems to shift the balance of policymaking power between the EU and its Member States.

However, there are two significant limits to the scope of the Directive introduced by the ‘setting the framework’ requirement, at least in the UK governmental context and particularly in relation to highly strategic government policy. The first limit concerns *who* the subsequent decision-maker for development consent is, and the second concerns the *timing* of the policy document that is

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<sup>63</sup> *Inter-Environnement Bruxelles* (n 50) confirms this.

<sup>64</sup> *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2013] EWCA Civ 920 [170].

<sup>65</sup> TFEU, art 192(2)(b).

suggested to set the framework. Lord Carnwath's reason for finding that the 'Decision and Next Steps' document at issue in *HS2* (the 'DNS', which committed the Government to its proposed HS2 strategy and set out a procedure for protecting its planned route and empowering its approval)<sup>66</sup> did not set the framework for the decision to approve the final HS2 project was that the DNS was more like a planning application, since it contained extensive information about the options for the proposal and its merits, but crucially did not constrain the ultimate decision-maker who would have to approve the scheme.<sup>67</sup> It set the terms of the debate but it did not set the framework for the final decision by constraining it. This was particularly because Parliament was the ultimate decision-maker in relation to the HS2 scheme. As the majority highlighted in the Court of Appeal, 'Parliament is constitutionally sovereign and free to accept or reject statements of Government policy as it sees fit, and the court should not seek to second-guess what Parliament will do'.<sup>68</sup> Lord Carnwath agreed: '[f]ormally, and in reality, Parliament is autonomous, and not bound by any "criteria" contained in previous government statements.'<sup>69</sup> This indicates that the constitutional supremacy and independence of Parliament was critical in determining whether or not the DNS 'set the framework' in the *HS2* case. This finding sets a bright-line limit to the application of the SEA Directive, in relation to policies and related consent decisions that are so 'controversial and politically

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<sup>66</sup> UK Government, *High Speed Rail: Investing in Britain's Future – Decisions and Next Steps* (Cm 8247, 2012).

<sup>67</sup> *HS2* [37].

<sup>68</sup> *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2013] EWCA Civ 920 [56]. See also *R (Buckinghamshire County Council, HS2 Action Alliance and ors) v Secretary of State for Transport* [2013] EWHC 481 (Admin) [95] (Ouseley J).

<sup>69</sup> *HS2* [39]. Cf Sullivan LJ in dissent in the CA who found there was no clear distinction between the government's role as promoter of the scheme and its role in the Parliamentary decision-making process. The government has a dual role: 'Parliament is constitutionally distinct from the executive, but members of the Government are members of Parliament': *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2013] EWCA Civ 920 [173].

sensitive’ that they are ultimately decided by Parliament.<sup>70</sup>

However, Parliament as subsequent decision-maker is the easy case for determining whether the SEA Directive applies, when put in such constitutional terms. But what about when the subsequent decision-maker is a planning Minister or a local government planning authority or other administrator/regulator? Presumably, in that case, a policy statement such as the DNS could have set the framework for a future consent decision, rendering the SEA Directive applicable. Sullivan LJ made this point in the Court of Appeal, which counsel for the Government had accepted.<sup>71</sup> For the HS2 project, development consent for such a nationally significant project could have been sought through the development consent procedure for nationally significant infrastructure projects under Planning Act 2008, or by an order for a scheme of national significance under the Transport and Works Act 1992. Either way, the DNS would have ‘set the framework’ in that it would have been a material consideration that the decision-maker considering ultimately whether to approve the scheme by either route would have had to take into account.

The second limit (or complexity) that arises from the Directive’s ‘setting the framework’ requirement relates to timing, particularly in relation to multi-stage decision-making processes for project consent, which come after a long gestation period in background policy development. The Directive is designed to apply and intervene in this kind of process before the final consent decision, if ‘major effects on the environment [are] *predetermined* by earlier planning measures’.<sup>72</sup> But the exactly moment at which it will apply can be difficult to pinpoint. In a complex and multi-stage policy and decision-making process, it might be hard to discern at what point in

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<sup>70</sup> *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2013] EWCA Civ 920 [56].

<sup>71</sup> *ibid* [151].

<sup>72</sup> *HS2* [35] (emphasis added).

a series of government White Papers, other Command Papers, Ministerial Statements and National Policy Statements, there is a certain document that constrains a final decision as to whether a particular sewage treatment plant, a bridge, a power plant, an airport, a train line will go ahead. The stories of airports and nuclear policy over the last decade or so certainly suggest that final project outcomes are not always obvious or predetermined by strategic governmental decision-making processes, even when there may be administrative law constraints in relation to how those kinds of governmental policy should evolve.<sup>73</sup> Outside the more structured strategic planning documents mandated by statute, such as National Policy Statements under the Planning Act 2008, it will not always be obvious (and will no doubt depend on the facts) whether the government has effectively constrained future consent decision-making through issuing a policy statement. This is a challenging position for the government when devising high-level policies relating to national infrastructure and land use planning, in relation to which there are multiple, often conflicting socio-political considerations; in relation to which policy positions can change through debate and discussion; and for which the government believes it (or Parliament) contains ultimate decision-making power.<sup>74</sup>

It is an even more challenging position for the courts, in a constitutional sense, in considering when to intervene in such complex policy and decision-making processes. This difficulty is highlighted by the fact that courts are uncomfortable in intervening to test the legality of strategic decision-making processes that are ongoing

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<sup>73</sup> e.g. *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin). See also *R (London Borough of Hillingdon) v SS for Transport* [2010] EWHC 626 (Admin).

<sup>74</sup> And the government might need this flexibility not to pre-determine the final result politically, particularly if there is a change of government.

and politically sensitive.<sup>75</sup> The likelihood of this kind of intervention is somewhat minimised by Lord Carnwath's finding that mere influence on final decision-making, even in the form of potent arguments put forward for a particular proposal, is not enough for a government policy to fall within the SEA regime.<sup>76</sup> However, as set out above,<sup>77</sup> the Directive's 'setting the framework' requirement seems to depend, in English law at least, on the extent to which policy documents and statements are legally material and relevant considerations in relation to final consent decisions (rather than on whether they predetermine the environmental impacts of a final project, for instance). As Section 2 set out, English law has increasingly recognised the legal effects of environmental policy instruments in administrative law terms, although the extent of their legal relevance varies depending on who issued the relevant policy, how well considered it was, and so on. However, on its current judicial interpretation, the SEA Directive does not seem to recognise that certain plans or programmes may 'set the framework' to different degrees – it seems that any legal effect will do.<sup>78</sup> For multi-stage policy and decision-making processes, this suggests that the precise point at which the SEA Directive might bite in such a process can be unpredictable, and might not reflect the point at which key environmental impacts of a project are most fully constrained and predetermined. A problematic scenario thus arises in that, if the government seeks to give some assurance of the direction of travel for a certain kind of strategic project, for example concerning a major road network, an airport or planned trainline, it becomes more likely that the Directive might apply to require assessment of the planned project when the government is of

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<sup>75</sup> See *Hillingdon* (n 73); *HS2* (particularly in relation to the EIA challenge at this stage of the process of considering and finalising the parameters of the HS2 project: see Lord Reed [93]-[97].)

<sup>76</sup> *HS2* [41] ('A test based on the potency of the influence could have the paradoxical result that the stronger the case made in favour of a proposal, the greater the need for strategic assessment.').

<sup>77</sup> See nn 61-61 and accompanying text.

<sup>78</sup> Cf *HS2* [121] (Lord Sumption).

the view that its shape and conditions are not yet set but still open to discussion and change through policy development. Legal challenges at such points might be unhelpful in the ongoing process of debate relating to a future project, and they might fail to pursue the central purpose of the Directive, which is to ensure that environmental impacts are assessed when they are actually decided ‘upstream’ in a decision-making process.<sup>79</sup>

### **How the Directive Constitutes and Constrains Government Policy**

Assuming that the SEA Directive applies in relation to a wide range of government policy documents, it then constitutes and constrains that policy and related political decision-making in a number of ways. As Section 2 highlighted, these are not unusual impacts in environmental law. First, the Directive constitutes policy by prescribing part of the process for its formulation – a prescribed environmental assessment needs to be carried out during the preparation of the relevant plan or programme,<sup>80</sup> which requires the preparation of an environmental report:<sup>81</sup>

in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated.

The report, along with the draft plan or programme, must then be made available to certain authorities and the public for comment.<sup>82</sup> The outcome of that consultation and the report itself must then be taken into consideration in the adoption of the final plan or programme, thus constraining its final formulation.<sup>83</sup>

In one sense, these requirements simply add to the process of policy-making.

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<sup>79</sup> *HS2* [155] (Lord Carnwath). See also Elizabeth Fisher, ‘Blazing Upstream? Strategic Environmental Assessment as “Hot” Law’ in the current volume.

<sup>80</sup> SEA Directive, art 4(1).

<sup>81</sup> *ibid*, art 5(1).

<sup>82</sup> *ibid*, art 6.

<sup>83</sup> *ibid*, art 8.

They do not directly prescribe the substantive outcome of an SEA process as it feeds into the design of a plan or programme. However, as the HS2 litigation showed, conducting an SEA can add time, which can be politically and financially costly or significant. Furthermore, it requires a deeper fleshing out of ‘reasonable alternatives’.<sup>84</sup> Article 5 of the Directive requires that reasonable alternatives are identified and evaluated in an SEA environmental report, which must then be taken into account in finalising the relevant plan or programme.<sup>85</sup> This raises the possibility of irrational decision-making – that is, decision-making that is open to legal challenge – if the government pursues a plan or programme where there exist other ‘reasonable’ alternatives (taking into account the objectives and the geographical scope of the relevant plan or programme)<sup>86</sup> that are less environmentally damaging. This apparently procedural requirement to consider alternatives can thus act as a substantive constraint on the formulation of strategic government policy, affecting a plan or programme’s final shape.<sup>87</sup> This is the main reason that the appellants in the HS2 litigation were so concerned to have the project subject to strategic environmental assessment, so that reasonable alternatives to the proposed HS2 rail route would have to be considered and, if found to be feasible and less environmentally harmful, ideally adopted.

The extent of this substantive constraint on policymaking may not be quite so

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<sup>84</sup> *ibid*, art 5(1). Cf the requirement to consider alternatives under the EIA Directive at the time of the HS2 litigation: Parliament and Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1, art 5(3)(d). Note the EIA Directive has since been made more demanding in this respect after its latest revision: see now art 5(1)(d) after Directive 2014/52/EU [2014] OJ L124/1.

<sup>85</sup> *ibid*, art 8.

<sup>86</sup> *ibid*.

<sup>87</sup> This hybrid procedural/substantive character is not confined to SEA. There are also different ways of framing the understanding of EIA, which does not contain as much substantive direction as SEA. For example, it can be seen as a process that can embody a range of different environmental values and politics, rather than simply being an instrumental procedure. See Fisher, Lange and Scotford (n 12) 847-853.

significant, in light of the Supreme Court's apparent acceptance that the alternatives required to be considered by an SEA environmental report would need to achieve the same end as the proposed plan or programme (in the case of *HS2*, constructing a new high speed rail network over the designated area of the UK).<sup>88</sup> In this respect, much depends on how the 'end' of a plan or programme is defined, and who has the authority to identify that goal. However, overall, the SEA process does, in a real way, limit and constrain how a government can introduce and decide on policy matters that come within the scope of the Directive.

#### **4. Public Law Implications and Reflections**

So why does all this matter? In one sense, the mechanism of the SEA Directive is a novel and interesting legal development, which is a tricky legal puzzle to get to grips with. It's good business for environmental lawyers to have knotty legal instruments like this to figure out. However, for the English lawyer more generally, the Directive has notable implications, particularly in public law terms. This final section sets out three ways (and there are no doubt more) in which the Directive is remarkable as a matter of public law, indicating how the potential scope of the Directive challenges principles or informs debates in English public law. These relate to the role of law in controlling executive power, the constitutional and institutional competence of the courts, and the impact of EU law on the public law of the United Kingdom.

First, the most startling aspect of the Directive is the fact that its very premise is to make inroads into the policymaking function of government. It is not surprising

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<sup>88</sup> *HS2* [47]-[48] (Lord Carnwath accepting the view of Ouseley J below, unchallenged in the Supreme Court). Cf Habitats Directive (n 38) art 6(4) where 'alternative solutions' is interpreted by the Commission to include doing nothing if the impact on protected sites or species is particularly significant, as well as considering 'alternative locations or routes, different scales or designs of development, or alternative processes': Commission, 'Guidance Document on Article 6(4) of the "Habitats Directive" 92/43/EEC' (2007/2012) 6.



that it was a controversial measure to pass in the EU legislature. And while the Directive does not apply in relation to *all* government plans and programmes that will have major environmental effects (although there was some judicial dismay in *HS2* that it does not do so),<sup>89</sup> the analysis in Section 3 shows that it has an extensive reach, particularly in an era of highly structured and open policymaking at Whitehall. This legal intrusion into executive policymaking is constitutionally remarkable, an implication which was masked (or avoided) in the *HS2* litigation due to the ultimate decision-maker in that case being Parliament. Whilst, in one sense, there is nothing contentious about Ministers or executive actors being subject to legislative constraint (in this case The Environmental Assessment of Plans and Programmes Regulations 2004),<sup>90</sup> it is the nature of this legislative constraint implementing the SEA Directive that is constitutionally significant, in that it limits the power of government to set policy. In doing so, it defines and partly resets the balance of UK executive power. In 1998, Eric Barendt described the powers of the executive, within the constitutional settlement of the UK, as follows:<sup>91</sup>

The executive is not only the most powerful, but it is the most difficult of the three branches of government to explain. In the first place, it is hard to describe exactly what are executive *functions*. They are much more varied than legislative and judicial functions. The choice of Prime Minister, the formation of governments, the dissolution of Parliament, the making of treaties, and the conduct of war all involve executive decisions. The **preparation of general economic and social policy**, as well as its detailed administration, are equally executive functions...

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<sup>89</sup> *HS2* [134] (Lady Hale). See also Sullivan LJ in the Court of Appeal who concluded: ‘the “High Speed Rail Strategy” set out in the DNS is a prime candidate for an SEA if the objectives of the Directive, to provide for a high level of protection for the environment, and to ensure that certain plans and programmes which are “likely to have significant effects” on the environment are subject to an SEA, are not to be frustrated. The Respondent was not able to identify any current UK project which is likely to have more significant effects on the environment’: *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2013] EWCA Civ 920 [164].

<sup>90</sup> SI 2004/1633. This is the rule of law: see Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, McMillan & Co, London 1959) 327.

<sup>91</sup> Eric Barendt, *An Introduction to Constitutional Law* (OUP 1998) 107-108 (emphasis added).

Other scholars have similarly highlighted the wide-ranging powers of the executive. In 1964, Birch argued that the UK had in fact shifted from a Westminster (parliamentary) form of government to a Whitehall form of government.<sup>92</sup> More recently, Diana Woodhouse has emphasised the scope of policymaking power that now exists beyond the reach of Ministerial responsibility to Parliament.<sup>93</sup> However, the SEA Directive moves in the reverse direction, curtailing the policymaking freedom of the executive and subjecting it to legal constraint. Thus, even where the Government or a particular Minister is not acting under statutory mandate in proposing and developing a policy, as it has the power to do, the SEA Directive may well apply to construct and limit the process of government in *developing* that policy rather than in simply applying it.<sup>94</sup> If it was already difficult to explain the functions of the executive,<sup>95</sup> the SEA Directive seems to have made matters more complicated and to have reduced to some extent the powers of one branch of government in the UK.<sup>96</sup>

This impact is highlighted by the extent to which the Directive, and judicial oversight of it, can be construed to apply in advance of the final formulation of governmental policy that has any environmental impact and dimension (which covers quite a lot of policy areas). The whole point of the Directive is to prevent pre-determined decisions that will have significant effects on the environment, but, in achieving that aim, the Directive has scope to intervene in politically sensitive

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<sup>92</sup> A H Birch, *Representative and Responsible Government: An Essay on the British Constitution* (University of Toronto Press 1964).

<sup>93</sup> Diana Woodhouse, 'Ministerial Responsibility' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2003).

<sup>94</sup> See Section 2 for how the latter already happens in environmental law.

<sup>95</sup> See the related complexity in analysing the concept of ministerial responsibility: Woodhouse (n 93).

<sup>96</sup> Cf Lords Neuberger and Mance on the EIA Directive: 'Nothing in the Directive suggests that it is aimed at excluding either political involvement or reasoning based on political policy decisions from planning decisions. On the contrary, the recognition that projects may legitimately be approved by specific legislative act constitutes express recognition of the legitimacy of such factors': (*HS2* [209]).

processes. As seen in Section 3 above, this gives rise to some legal complexities about the timing at which such intervention should take place, particularly since not all policies will pre-empt or constrain ultimate project consent decisions, but the Directive certainly provides a lever for judicial intervention in policymaking processes to test their legality at a developmental stage. This kind of legal impact is not something that public lawyers have spent a lot of time thinking about. The extensive theorising that has gone into thinking about public law in the courts has mainly concerned judicial review challenges in relation to discrete administrative decisions,<sup>97</sup> rather than being concerned with legally testing the path of governmental policy formulation and decision-making as it goes along, including considering its substantive formulation. If nothing else, the Directive, and its potential for triggering judicial review claims, opens up new ground for public lawyers in thinking about the nature of judicial review and administrative law.

However it also leads to the second key public law issue that the Directive challenges: the constitutional and institutional competence of the courts. Any normative statement as to the proper constitutional role of the courts requires a particular theoretical approach to be taken to the UK state, which then informs the appropriate balance of power between the courts, Parliament and the executive.<sup>98</sup> To the extent that a defensible constitutional model of the UK state provides that the courts have no constitutional competence in expressing views on social or economic

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<sup>97</sup> See e.g. Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' in Christopher Forsyth, *Judicial Review and the Constitution* (Hart Publishing 2000).

<sup>98</sup> Carol Harlow & Richard Rawlings, *Law and Administration* (3<sup>rd</sup> ed, CUP 2009) #. The existence of different normative models can also lead to a 'somewhat disconnected heap of [intellectual] activities' in theorising about UK constitutional law: Geoffrey Marshall, 'The Constitution: Theory and Interpretation' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2003).

issues, or on any matters of ‘policy’,<sup>99</sup> the role of the courts in reviewing government plans or programmes may appear problematic. However, one may argue that there is nothing improper with the courts enforcing the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004 – their legislative imprimatur can properly be upheld by the courts by way of judicial review. As Dicey pointed out, ‘[executive p]owers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself and, what is more, by the interpretation put upon the statute by the judges.’<sup>100</sup> However, the more broadly the requirements of the Directive are interpreted (how far ‘administrative’ provisions are construed, and what the full extent of measures are that might ‘set the framework’ for future consent decisions), the more that the courts may be involved in resetting policymaking. If not expressing a view on policy matters, they may well be involved in discounting the significance of the executive’s views and function, which does seem like a shift in their constitutional role, arguably beyond the limits of their constitutional competence.

Whichever model of the state, and of the rule of law, sets that constitutional frame, it is more straightforward to argue that the Directive redefines the ‘institutional competence’ of the courts.<sup>101</sup> Simply put, in reviewing the lawful formulation of a plan or programme under the Directive, the courts will be able to test and check one aspect of substantive input into plans and programmes – that concerning their environmental effects – where those plans and programmes have multiple social aspects and involve polycentric decision-making processes. In this way, the institutional competence of the courts is being both widened (by widening the scope

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<sup>99</sup> *R (Hammersmith & Fulham LBC) v Secretary of State for the Environment* [1991] AC 521; Jowell (n 97) 330. Cf Timothy Endicott, *Administrative Law* (2<sup>nd</sup> ed, OUP 2011) #.

<sup>100</sup> Dicey (n 90) 413.

<sup>101</sup> See Jowell (n 97) 330.

of what constitute reviewable ‘legal’ issues) and reoriented (towards the consideration of substantive environmental issues).

The third public law issue, more a debate, which is informed by the SEA Directive, concerns the impact of EU law on English and UK public law. If the above two impacts are indeed being felt on the English constitutional landscape – the increased legal control of executive power and a reframing of the constitutional (and institutional) competence of the courts – then that means that EU law, through the SEA Directive, is impacting on the constitutional architecture of English law. The difficult UK public law cases that have dealt with the clash of EU and UK constitutional orders to date have focused primarily on threats posed by EU legislative measures to the supremacy of Parliament.<sup>102</sup> The impact of the SEA Directive examined in this chapter shows that there are other aspects of the UK constitutional order that are susceptible to change by the implementation of EU law. The lawfulness, or at least the constitutional understanding, of this influence is yet to be fully worked out.<sup>103</sup> Yet again, environmental law challenges us to think about public law concepts in a different light, and to reframe our legal analysis accordingly.

## 5 Conclusion

The recognition of the important role of policy in environmental law is not surprising for the environmental law scholar or practitioner, but it is one that raises quite fundamental questions about the nature of law in relation to environmental problems, and which might be more surprising (or at least interesting) to a constitutional lawyer. Environmental law is not merely an applied law subject; it reflects interesting insights

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<sup>102</sup> *R (Factortame Limited and others) v Secretary of State for Transport* [1990] UKHL 13; *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

<sup>103</sup> Cf constitutional issues raised in *HS2* in relation to the EIA Directive: see *HS2* (Lord Reed in particular) and Edwards (n 6).

about other legal areas, and even shapes them. This chapter has shown that this is particularly the case in relation to the SEA Directive. This might not seem obvious from a first glance at the Directive and its purpose, as Lady Hale states in *HS2*:<sup>104</sup>

the aim of the Directive is not to ensure that all development proposals which will have major environmental effects are preceded by a strategic environmental assessment; rather, it is to ensure that future development consent for projects is not constrained by decisions which have been taken “upstream” without such assessment, thus pre-empting the environmental assessment to be made at project level.

However, a closer examination of the Directive, and its potential scope in constituting and limiting, and in some cases requiring judicial review of, government policy shows that its impact on issues of English public law can be significant. This raises questions about the proper roles of the executive and the courts, and the constitutional impact of EU law in the UK legal order. In short, this chapter argues that environmental law offers a different and challenging legal perspective for thinking about important questions of public law.

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<sup>104</sup> *HS2* [155].